Supreme Court, U. S.
FILED
DEC 22 1976
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

76-853

October Term, 1976

No. 76-

ANTHONY STASSI,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JULIA P. HEIT
Attorney for Petitioner
DILLER, SCHMUKLER & ASNESS
345 Park Avenue
New York, New York 10022
(212) 371-1400

(10260) LUTZ APPELLATE PRINTERS, INC.
Law and Financial Printing
South River, N.J. (201) 257-6850 | New York, N.Y. (212) 563-2121 | Philadelphia, Pa. (215) 563-5587 | Washington, D.C. (201) 783-7288

TABLE OF CONTENTS

Page

Opinion Below 2

Jurisdiction 2

Questions Presented 2

Statement of the Case 3

The Defense 8

Reasons For Granting the Writ 9

Conclusion 17

TABLE OF CITATIONS

Cases Cited:

Barker v. Wingo, 407 U.S. 514 (1972) 13, 14, 16

United States v. Mendez-Rodriquez, 450 F.2d 1 (9th Cir. 1971) 11

United States v. Quinn, 445 F.2d 940 (2d Cir. 1971) 9, 10

United States v. Sherwood, 38 F.R.D. 14 (D.C. Conn. 1964).. 15

United States v. Tsutagawa, 500 F.2d 420 (9th Cir. 1974) 11, 12

Statutes Cited:

Title 21, U.S.C. §§812, 841(a)(1), 841(b)(1)(A), 951(a)(1), 952, 173, 174 ..... 1, 2

Contents

Page

Title 28, U.S.C. §1254(1) 2

Rule Cited:

Fed. R. Crim. Pro. Rule 6(e) 3, 13, 14, 15, 16

United States Constitution:

Fifth Amendment 3

Sixth Amendment 2, 3, 10, 11

APPENDIX

Appendix A — Judgment 1a

Appendix B — Decision 2a

In The

Supreme Court of the United States

October Term, 1976

No. 76-

ANTHONY STASSI,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To: The Honorable, the Chief Justice of the United States and the Associate Justices of the United States Supreme Court:

Petitioner Anthony Stassi respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit affirming a judgment of the United States District Court for the Southern District of New York convicting petitioner after trial of conspiracy to violate on and after May 1, 1971 Title 21, U.S.C. §§812,

841(a)(1), 841(b)(1)(A), 951(a)(1) and 952 and prior to May 1, 1971 to violate Title 21, U.S.C. §§173 and 174. Petitioner was also convicted of the substantive counts of unlawfully importing a narcotic drug into the country (Title 21, U.S.C. §§173 and 174), concealing a narcotic drug in this country while knowing the same to have been illegally imported (Title 21, U.S.C. §§173 and 174), the knowing importation of a narcotic drug (Title 21, U.S.C. §§812, 841(a)(1) and 841(b)(1)(A)), and the knowing possession with intent to distribute said drug (Title 21, U.S.C. §§812, 841(a)(1) and 841(b)(1)(A)).

OPINION BELOW

The United States Court of Appeals for the Second Circuit affirmed the judgment of the District Court in a written opinion, which is annexed hereto as Appendix B (2a).

JURISDICTION

The judgment of the Court of Appeals was entered on October 26, 1976 and is annexed hereto as Appendix A (1a).

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

An application for an extension of time to file this petition has been sought and was granted by Associate Justice Thurgood Marshall on November 22, 1976. Petitioner has been granted an extension to December 23, 1976 to file said petition.

QUESTIONS PRESENTED

1. Whether the gross negligence of the Parole Board and Immigration Department in deporting a key defense witness can be attributable to the United States Attorney's office, since all three departments are part and parcel of the Department of Justice and whether, by virtue of said negligence, petitioner was deprived of his constitutional right under the Sixth Amendment to examine a witness critical to the presentation of his defense.

2. Whether petitioner was deprived of his constitutional right to a speedy trial under the Fifth and Sixth Amendments by virtue of the 29-month delay between the indictment and trial, which was prompted by the improper sealing of his indictment in direct contravention of Rule 6(e) of the Federal Rules of Criminal Procedure, and whether said delay resulted in undue prejudice to him, since during this interval a prime defense witness had been negligently deported to France by the Government, and petitioner had been subjected to continual governmental surveillances.

STATEMENT OF THE CASE

On April 30, 1973, the Government filed Indictment Number 73 Cr. 405, which charged only petitioner with conspiring to receive and conceal narcotic drugs from May 1, 1970 through October 15, 1970. Petitioner was also charged with one substantive count of receiving 40 kilos of heroin. On this same date, Judge Ryan ordered the indictment sealed pursuant to the Government's claim that petitioner was presently being investigated on a different charge, and that the unsealing of the indictment would jeopardize their investigation. On June 27, 1973, Judge Wyatt unsealed the indictment for the sole purpose of issuing a bench warrant for petitioner's arrest, and then ordered the indictment resealed.

Petitioner was arrested in Atlanta, Georgia on December 30, 1974 and was arraigned on the indictment on February 4, 1975. His counsel promptly informed the court that petitioner intended to file motions to dismiss the indictment on the ground of lack of speedy prosecution. Counsel also protested the sealing of the indictment and claimed that the Government's reasons for sealing said indictment: to wit, that petitioner was out of the country and under investigation on different charges, were invalid. Counsel asserted that the Government files, as disclosed to the defense, revealed that the Government knew the exact whereabouts of petitioner and had ample opportunity to arrest him at either his New York or Florida address. Counsel

therefore requested a *de novo* determination by the court of the Government's good faith in requesting that the indictment be sealed. Counsel contended further that if the Government's reasons were not valid, then the 22-month delay between indictment and arrest cannot be sanctioned, and the indictment should be dismissed.

Additionally, counsel claimed that the two year delay between indictment and arrest impaired petitioner's ability to adequately prepare a defense, since the memories of witnesses "have grown dim," certain potential witnesses have died, and factual documents have been lost.

In opposition to petitioner's claims, the Government essentially responded that the defense could not point to any prejudice except the dimming of memories and the loss of factual documents. The Government also submitted the following affidavits:

Arthur Viviani, former Assistant United States Attorney, set forth in his affidavit that the indictment was sealed because they did not want to jeopardize the continuing investigation of petitioner; Special Agents Bocchichio and Elledge maintained in their respective affidavits that their investigation involved a large scale cocaine smuggling operation in Miami and that the Florida agents had requested that the indictment remain sealed so that their investigation would not be jeopardized.

On March 4, 1974, oral argument was held on the aforementioned motions. In response to petitioner's request for a hearing to determine the good faith of the Government in requesting the sealing of the indictment, the court stated that the defense had not made a sufficient showing of bad faith on the part of the Government to warrant a hearing. When petitioner then requested an April trial, the Government stated that there was a possibility of a superseding indictment (Min. of 3/4/75, 11, 27-29, 34).

Thereafter, on April 8, 1975, the Government declared that there was a superseding indictment which named many more defendants. Counsel again protested and requested either a dismissal of the indictment, or alternatively, a severance of petitioner's case from that of his co-defendants (Min. of 4/8/75, 20-21). Accordingly, on April 11, 1975, the court warned the Government to be prepared for a severance (Min. of 4/11/75,15).

Superseding Indictment 75 Cr. 395 was finally filed on April 11, 1975 and differed from the original indictment in that it added four defendants (Stassi, Sorenson, Otvos and Guidicelli); enlarged the time frame of the conspiracy to encompass the period from January 1970 through December of 1972; added more co-conspirators; and charged petitioner with the commission of three more substantive counts of narcotics violations.[1]

In a motion dated April 21, 1975, petitioner asserted that the Government had first represented on February 4, 1975 that the superseding indictment would be sought in a short time, but it was now 70 days later. Counsel emphasized that because of the staleness of the indictment, the court had originally set a trial date for May 5, 1975. Counsel further maintained that while the other defendants would be unable to prepare for trial within the three weeks, petitioner was then ready for trial. Moreover, according to counsel, since the other two co-defendants were already serving prison terms, their need for a separate trial was not as compelling.

Petitioner at this juncture also asserted that while the original indictment was pending and prior to the return of the superseding indictment, the Government had deported Otvos, a co-defendant, who had been incarcerated for a number of years in the federal penitentiary. Predicated on this fact, petitioner thereafter on July 25, 1975 moved to dismiss the indictment

1. On May 23, 1975, another superseding indictment (75 Cr. 502) was filed and differed from its predecessor in that it named two additonal defendants, Carmine Consalvo and Charles Alaimo.

because of the deportation of Otvos. It was submitted that Otvos' testimony would have been beneficial to the defendant since it would have contradicted the testimony of the Government's key witnesses, Perna and Verizino. Petitioner additionally pointed out that on June 23, 1975, the court had denied his motion for a dismissal of the indictment on the ground of lack of speedy prosecution because he did not make a showing of actual prejudice. Petitioner claimed that this burden was satisfied by the deportation of Otvos between the time of the original indictment and when the superseding indictment was returned.

Pursuant to petitioner's application, a hearing was held on October 14, 1975 to determine if the Government's deportation of Otvos was wilful. During the course of the hearing, the court acknowledged that there was "plenty of negligence" in that the Department of Immigration had received a report that Otvos was the head of a criminal organization with members incarcerated at the federal penitentiary. The court noted that the Parole Board got a statement from the Department of Justice that they were about to indict Otvos and still they did not take any action (H169-70).

It also cannot be overlooked that two Government Agents, James Bradley and Carroll A. Boccia, had conducted thorough interviews with Otvos before his deportation and had even informed him that unless he co-operated, he would be indicted in the near future. These interviews took place in November or December of 1974, and Otvos was thereafter deported on March 3, 1975.

Although the court concluded that there was gross negligence on the part of the Parole Board in deporting Otvos, it was of the opinion that said negligence could not be imputed to the United States Attorney's office.

The genesis of the reputed conspiracy was implemented in the Atlanta Penitentiary, when the Government's key witness, Mario Perna and Anthony Verizino decided to embark on a scheme to sell narcotics. In order to obtain a source for the illicit drug, the two men contacted Claude Otvos, a Frenchman, who was then imprisioned in Atlanta for smuggling narcotics. They then contacted Joe Stassi, who in turn was to contact his brother, petitioner in this case, whose function was to be the outside man. It was then decided that when defendant Sorenson was released from the penitentiary, he would assist petitioner.

The only Government witness to testify to the actual shipments of narcotics was Michael Mastantuono, who claimed that he made two separate deliveries of heroin to petitioner and others in September of 1970 and June of 1971. This heroin was concealed first in a Citroen, and then in a stationwagon, and driven from Canada to New York City.

In addition to the aforementioned evidence, the Government also was permitted, over objection, to have several witnesses testify regarding their surveillances of petitioner and Sorenson after December of 1972.

William Lecates, a former Special Agent with the DEA, testified that in June of 1973, he observed petitioner at 2161 Northeast 122nd Street in Miami. This house was listed to a Carol Hoover. According to the agent, petitioner was observed arriving there about six or seven times, and leaving there two or three times. Specifically, on December 16, 1973, he observed petitioner, Ms. Hoover, and a 14 year old boy leave the car and go into a department store. He also observed them enter a Burger King (1770). Counsel objected to this testimony, claiming that it did not occur in the period charged in the indictment, and further, that such surveillance testimony gave rise to sinister connotations (1757-60).

Everett Elledge, a Special Agent with the DEA, testified that during November and December of 1973, he observed petitioner in the vicinity of 3521 61st Street in Miami with a lady named Carol Hoover (1778). On December 5, 1973, he also saw petitioner enter an apartment owned by Salvatore Autera. He stated that he saw petitioner with Autera on about 10 or 12 different occasions. The agent was later told that Autera had owned a pharmacy in New York, and was petitioner's neighbor (1782).

Sergeant Bernard Gillespie testified that on January 15, 1973 at 4:00 p.m., he went to LaGuardia Airport pursuant to a telephone call. He observed petitioner exiting from the arrival section where he was met by another man. Petitioner made a phone call, went into the men's room, returned to the phone booth, and made another phone call. The two men entered a green Cadillac and drove to 252 West 72nd Street where petitioner entered this building. The other man entered 251 West 72nd Street for about 10 minutes. Petitioner left the building with an unknown female and went to the Casa Bella Restaurant in Brooklyn (1838). He went into the bar and engaged in a conversation with Sorenson. The sergeant then followed petitioner to a building on Caton Avenue in Brooklyn. The sergeant did not know whether petitioner was simply paying his respects to someone in the building who had just sustained a loss (1841).

The Defense

Petitioner in turn presented three witnesses whose testimony demonstrated that their premises were never used during the month of September 1970 as a transfer point in the Citroen transactions.

REASONS FOR GRANTING THE WRIT

I.

This case presents an issue of first impression in this Court. Contrary to the Second Circuit's opinion, it is submitted that the United States Attorney's office must be held accountable for the gross negligence of the Parole Board and Immigration Department in deporting a key witness, since all the departments are part and parcel of the Department of Justice. And equally important, if it is found that such negligence can be imputed to the United States Attorney's office, it is then incumbent upon this Court to construe whether petitioner was in fact deprived of his constitutional right under the Sixth Amendment to examine a witness critical to the presentation of his defense, especially when the Government had such an opportunity and readily availed themselves of it.

Despite the fact that the Second Circuit agreed that the "Parole Board was grossly negligent in proceeding with the parole and deportation of Otvos after receiving notice of the possibility of his indictment" (4a), the Court refused to impute the Parole's Board's negligence to the prosecution. In support of its holding, the court relied on its former decision in *United States v. Quinn,* 445 F.2d 940 (2d Cir. 1971) in attempting to disassociate the prosecution from the negligence of the Parole Board. The facts of *Quinn,* are inapposite to the facts at bar.

In *Quinn,* after a successful prosecution had ended in the Southern District, the indictment of a key Government witness, which theretofore had been sealed by the United States Attorney's office in Florida, was announced a week after the termination of the trial. The defendants therefore claimed that there had been a suppression of evidence on the part of the Government, and took the position that knowledge on any part of the Government is equivalent to knowledge on the part of this prosecution. Although the Second Circuit rejected the argument as absurd, petitioner in this case is not raising such an abstract

argument, and has established a sufficient nexus between the prosecution and the Parole Board to justify an imputation of negligence to the prosecution.

First, in *Quinn,* there was no finding of gross negligence on the part of any Government body. No claim was raised that either the prosecutor's office in Florida or New York should have taken some affirmative steps to protect the defendants' interests. In this case, the court made a finding that the Parole Board was grossly negligent in its handling of Otvos' parole, and the Second Circuit adopted this finding. Moreover, it was petitioner's further claim that the prosecution, under the circumstances of this case, was obligated to take some action to secure Otvos' presence for trial, since they knew full well that his parole was pending. Second, no communication between the prosecutor in the Southern District and their office in Florida, existed in *Quinn,* which would have served to alert the other as to what was transpiring in their respective offices in regard to the defendants' cases. Here there were specific communications that went completely unheeded. Thus, as opposed to *Quinn,* the activities of the Parole Board and the Prosecution were so inextricably intertwined that the gross negligence of the former must be attributed to the latter.

Unfortunately, there is a dearth of case law bearing directly on this issue. And consequently, it is now incumbent upon this Court to resolve this difficult question of the degree of accountability that must be assumed by the prosecution when another agency which is also within the Department of Justice, acts so negligently so as to deprive a defendant of an invaluable constitutional right.

Furthermore, a corollary issue involved here is whether in the context of the Compulsory Process Clause of the Sixth Amendment any Government action in making a witness unavailable to the defense, even if not deliberate, would violate his constitutional rights. Although this case was of first impression in the Second Circuit, the Ninth Circuit has taken a conflicting position.

Thus, in *United States v. Mendez-Rodriquez,* 450 F.2d 1 (9th Cir. 1971) the defendant, who was convicted of conspiracy to smuggle aliens into the United States, alleged that the Government had violated his constitutional rights by deporting to Mexico three of the six witnesses before the defense had an opportunity to interview them. The Ninth Circuit in its decision noted that it had been the policy of the Immigration and Naturalization Service in that district to detain only three or four aliens as material witnesses, interview the remaining aliens, and then return them to Mexico. Based upon these facts, the court held that while the Government is under no obligation to search and produce witnesses who may be favorable to the accused, there is a denial of due process when such witnesses have been made unavailable by the conduct of the Government. It should be noted that it is unclear from this decision whether the prosecution had actual knowledge of the Immigration Service's policy to deport these aliens after their initial interview. Evidently, the Ninth Circuit felt it unnecessary to make such a distinction since it correctly viewed the conduct of the Immigration Service's and the United States Attorney's office as a single Government action which resulted in an abridgement of the defendant's Sixth Amendment right. See also *United States v. Tsutagawa,* 500 F.2d 420 (9th Cir. 1974).

Finally, irrespective of which specific branch of Government bears the responsibility for the deportation of Otvos, one sound fact emerges. Petitioner, through the Government's actions, was deprived of a valuable right under the Sixth Amendment. Therefore, this Court should focus upon the loss of this fundamental right, rather than deciding the culpability of the agencies involved. The court below initially took this approach when it admitted that it would have been confronted with a difficult problem if it could be persuaded that Otvos' testimony was essential to the defense. In making its ruling dependent upon the value of Otvos' testimony, the court misconstrued the thrust of the Sixth Amendment right to compulsory process. The Ninth Circuit, in *Mendez-Rodriquez, supra,* flatly rejected the notion that it was necessary for the

defense to make some showing that the interview would have been fruitful to the defense. And the court subsequently explained its reasons for this policy in *United States v. Tsutagawa, supra,* at p. 434:

> "The thrust of *Mendez-Rodriquez* is to prevent the basic unfairness of allowing the Government to determine which witness will not help either side and then to release those witnesses, for all practical purposes beyond the reach of the defendant. . . . The vice lies in the infettered ability of the Government to make the decision unilaterally. The Sixth Amendment guarantees a defendant the right to subpoena favorable witnesses. . . . Here the Government placed witnesses, who may have been favorable to the appellees, outside the power of our courts to require attendance. . . . A defendant has the right to formulate his defense uninhibited by Government conduct that, in effect, prevents him from interviewing witnesses who may be involved and from determining whether he will subpoena and call them in his defense."

In this context, the Government cannot argue that it is sheer speculation whether Otvos would have agreed to testify in behalf of the defense. It was the opportunity to interview Otvos which was of paramount importance to petitioner, for such an interview could have led not only to favorable testimony from him, but also to other information relevant to the defense. It is offensive to any concept of due process that the Government, but not the defense, had every opportunity to interview Otvos before his deportation and readily took advantage of these opportunities. Because their attempts to glean information from him were not successful, does not mean that the defense should

be deprived of a similar opportunity to question this critical witness.[2]

Accordingly, it is respectfully requested that this Court grant petitioner's application for a writ of certiorari so that the aforementioned issues finally can be resolved.

II.

In this case, this Court is confronted with a combination of extraordinary circumstances which finally culminated in a denial of petitioner's constitutional right to a speedy trial. In considering the four-prong test enunciated in *Barker v. Wingo,* 407 U.S. 514 (1972), the District Court below properly concluded that at the first available opportunity petitioner promptly asserted his right to a speedy trial and further, that the 29-month delay between the indictment and trial was of sufficient duration to trigger the presumption of prejudice. Thus, the questions to be resolved by this Court are whether good reason existed for the delay, and whether petitioner as a result of the delay, had sustained any prejudice.

Petitioner asserts a good portion of the delay in his case (a 20-month period) was attributed to the improper sealing of the indictment in direct contravention of Rule 6(e) of the Federal Rules of Criminal Procedure. The Government acknowledged that the sealing of the indictment was sought solely to preclude jeopardizing their investigation of petitioner on an unrelated

2. Additionally, the notion that Otvos would not, or could not, have been helpful to the defense must be dispelled. Jean Claude Otvos was denominated a prime target in the Government's investigation into the alleged drug conspiracy in the Atlanta Penitentiary as early as December of 1974. Otvos was then the only person who could have refuted or offered information to refute Perna's and Verizino's testimony regarding the inception of the conspiracy and their claim that he was in fact the "French Connection." While Joe Stassi denied involvement in any drug conspiracy in the Atlanta Penitentiary, he could not deny Otvos' participation, since he was never alleged to have been present during Perna's and Verizino's discussions with him. Therefore, Otvos was the only witness who was in a position to refute their stories and his testimony would have been invaluable to the defense.

case. Neither this Court nor any other court has had occasion to pass upon the important question of whether Rule 6(e) permits the sealing of indictments for such a reputed purpose. It is submitted that the sealing of the indictment on the ground that the Government did not want to jeopardize another independent investigation, violated the specific mandate of Rule 6(e) and that the delay which was incurred as a result of the improper sealing of the indictment cannot be deemed a "good reason" within the purview of the *Barker v. Wingo* rationale.

Rule 6(e) of the Federal Rules of Criminal Procedure provides:

> "The court may direct that an indictment shall be kept secret until the defendant is in custody or has given bail, and in that event the Clerk shall seal the indictment except when necessary for the issuance and execution of a warrant or summons."

This rule authorizes the sealing of the indictment for only one purpose and no other — the taking of the defendant into custody. The obvious objective of such a rule is to insure that a defendant will not flee the jurisdiction of the court upon learning that an indictment has been filed against him. There is nothing contained in the language of Section 6(e) that would permit the Government to use this provision as a means of continuing their investigation into any unrelated case. Clearly, if the rule was intended to have such a broad scope, it would have so specified. The court's over-broad interpretation of the intent of the rule is but a prime example of judicial legislation.

Moreover, the District Court erroneously was of the opinion that despite the absence of any delegation of authority, the Rule gave the court wide range discretionary power to seal the indictment so that the Government could carry out its legitimate law enforcement obligations. However, the only

discretionary power given to the court under the Rule is the right to decide whether or not it is necessary to seal the indictment in the first instance until the defendant is in custody. That is as far as the court's discretion extends. While law enforcement might be a legitimate concern of both the courts and the Government, the Government cannot be permitted to use the device of the unsealed indictment as a means to conduct other unrelated investigations. See *United States v. Sherwood,* 38 F.R.D. 14 (D.C. Conn. 1964).

Hence, the court below in granting the Government's continual applications to seal the indictment on the basis of these unrelated investigations exceeded the limited purposes authorized by Section 6(e).

The Second Circuit in its opinion completely ignored the legality of the sealing of the indictment. This Court is therefore confronted with the critical question of whether the Government can continue with its policy of seeking the sealing of indictments in order to investigate other unrelated cases.

In addition to exceeding the bounds of Rule 6(e),the Government, as a result of the misuse of this section, caused petitioner to sustain overwhelming prejudice. The Government used this period, when the indictment was sealed, to conduct its many surveillances of petitioner, and then proceeded to introduce the fruits of their surveillances at his forthcoming trial. Thus, it appears that the Government was not quite as candid with the courts regarding their true reasons for requesting the sealing of the indictment. While there might very well have been another investigation involving petitioner, the Government still used this interval for a third purpose — to gather more evidence against petitioner by keeping him under constant surveillance. Consequently, during this entire period, petitioner was subjected to the most devastating type of Government harassment. He was forced to undergo the humiliation and degradation of having his every movement observed by Government agents. His right of

privacy was violated in the grossest sense. Clandestinely charged with a crime, he lived that entire 20-month period as a marked man, unable to confront his accusors or stop such an abominable practice.[3] Had the indictment been made public, it is highly unlikely that the courts would have tolerated such actions on the part of the Government. Surely, it was never contemplated by the framers of Rule 6(e) that this provision would be used for such means.

Petitioner was also forced to sustain a more traditional type of prejudice because of the undue delay in the prosecution of his case. He lost an invaluable witness. As pointed out, during the period between indictment and trial, the Government had negligently deported Jean Claude Otvos, a key figure in the present conspiracy, to France. The value of securing Otvos' testimony, or just soliciting information from him, has already been set forth. Suffice to say that petitioner at this point need not prove that the United States Attorney's office was involved in the deportation of Otvos. Regardless of whether or not the Government is responsible for the loss of Otvos, the sole factor to be considered in conjunction with the speedy trial claim is that such an important witness was in fact unvailable to the defense because of the undue delay in bringing this case to trial.

Hence, considering all the facts and circumstances in this unique case, this Court should grant petitioner's writ of certiorari to determine whether petitioner has in fact satisfied the tests set forth in *Barker v. Wingo, supra.*

3. According to the Government's proof at trial, petitioner was allegedly aware of the fact that he was continually being followed. At his meeting with Perna and Malizia, he supposedly warned Malizia that he was under surveillance.

CONCLUSION

For the above stated reasons, petitioner's writ for certiorari should be granted.

Respectfully submitted,

s/ Julia P. Heit
Attorney for Petitioner

DILLER, SCHMUKLER & ASNESS
345 Park Avenue
New York, New York
10022
(212) 371-1400

December 17, 1976

APPENDIX A

JUDGMENT

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 113, 114, 115—September Term, 1976.

(Argued September 1, 1976 Decided October 26, 1976.)

Docket Nos. 76-1110, 76-1175, 76-1180

UNITED STATES OF AMERICA,

Appellee,

v.

JOSEPH STASSI, a/k/a Joe Rogers,
ANTHONY STASSI and WILLIAM SORENSON,

Defendants-Appellants.

Before:

KAUFMAN, *Chief Judge,*
FEINBERG and VAN GRAAFEILAND, *Circuit Judges.*

Appeal from judgments convicting appellants of narcotics violations following a jury trial before Judge Whitman Knapp in the United States District Court for the Southern District of New York.

Affirmed.

ARNOLD E. WALLACH, New York, N.Y., *for Defendant-Appellant Joseph Stassi.*

JULIA P. HEIT, New York, N.Y. (Diller, Schmuckler & Asness, New York, N.Y., of Counsel), *for Defendant-Appellant Anthony Stassi.*

APPENDIX B
DECISION

RALPH S. NADEN, New York, N. Y., *for Defendant-Appellant Sorenson.*

JAMES E. NESLAND, Assistant U. S. Attorney (Robert B. Fiske, Jr., U. S. Attorney for the Southern District of New York; Howard S. Sussman, Lawrence B. Pedowitz, Assistant U. S. Attorneys, of Counsel), *for Appellee.*

VAN GRAAFEILAND, *Circuit Judge:*

After a six-week jury trial before Judge Whitman Knapp in the United States District Court for the Southern District of New York, appellants were convicted of conspiracy to import and distribute heroin between January 1, 1970 and December 30, 1972; of importing and selling 40 kilograms in September 1970, and of importing and distributing 70 kilograms in June 1971.

The tale of their misdeeds is like the all too familiar plot of a Class B movie rerun, *see United States* v. *Cirillo,* 468 F.2d 1233 (2d Cir. 1972), *cert. denied,* 410 U.S. 989 (1973); *United States* v. *Santana,* 503 F.2d 710 (2d Cir. 1974), *cert. denied,* 419 U.S. 1053 (1974); *United States* v. *Magnano,* slip op. 5471 (2d Cir. Sept. 7, 1976), and does not merit a detailed recounting. Hatched in the federal penitentiary in Atlanta, Georgia where appellants Joseph Stassi and William Sorenson were incarcerated, the conspiracy contemplated the purchase of heroin from a "French connection" and the smuggling of it into the United States. Anthony Stassi, Joseph's brother, was recruited as the outside man to arrange the purchase and distribution of the drugs, and Sorenson, upon his release from prison in March 1970, assisted him. The proof, evaluated in the light most favorable to the government, was

sufficient to support the convictions. Of appellants' numerous assertions of procedural error, only a few invite discussion.

Deportation of Otvos

Indictment 75 Cr. 395, under which appellants were tried and convicted, named Jean Claude Otvos, another inmate at Atlanta, as a fellow conspirator. Subsequent to the issuance of the indictment on April 17, 1975, it was discovered that Otvos had been paroled and deported on March 3, 1975. Appellants, relying upon *Washington* v. *Texas,* 388 U.S. 14 (1967), contend that, in deporting Otvos, the government violated their Sixth Amendment right to examine a potentially important witness. We find no merit in this argument.

There was, as Judge Knapp found, a substantial probability that Otvos, as indicted co-conspirator, would have claimed his Fifth Amendment privilege and refused to testify had he been present in court. *See United States* v. *Finkelstein,* 526 F.2d 517, 524 (2d Cir. 1975), *cert. denied,* 44 U.S.L.W. 3624 (May 3, 1976). We need not, however, rest our decision on that ground.

At the hearing conducted by Judge Knapp on appellants' motion to dismiss the indictment, three special agents of the Federal Drug Enforcement Administration testified that Otvos told them in December 1974 that he would be eligible for parole in May 1975. This information was confirmed by an Intelligence Analyst of the Eastern District Strike Force, who was investigating Otvos on behalf of the Parole Board.

The Parole Board had requested this investigation in December 1974 but was not advised of Otvos' possible involvement in the instant conspiracy until January 31, 1975. In the meantime, because of a change in the law, Otvos became eligible for an earlier parole; and it was decided

that he would be paroled and deported on March 3. Judge Knapp found that the Parole Board was grossly negligent in proceeding with the parole and deportation of Otvos after receiving notice of the possibility of his indictment but refused to charge the United States Attorney's office or the Drug Enforcement agents with the same lack of care. Insofar as this finding was one of fact, it had ample support in the evidence. Appellants' contention that the Parole Board's negligence must be imputed to the prosecution was properly rejected by the District Judge. *United States* v. *Quinn*, 445 F.2d 940, 944 (2d Cir.), *cert. denied*, 404 U.S. 850 (1971); *cf. United States* v. *Morell*, 524 F.2d 550, 555 (2d Cir. 1975).

Appellant Anthony Stassi also relies upon the absence of Otvos to support his contention that he was deprived of his constitutional right to a speedy trial. Stassi was originally indicted on April 30, 1973 under Indictment 73 Cr. 405, which charged him alone with the receipt of 40 kilograms of heroin on September 28, 1970. This indictment was sealed in order that the government could pursue the investigation which led to the uncovering of the massive conspiracy established on the trial below.

We fail to see how the government's delay in bringing Stassi to trial on the 1973 indictment charging him with a single substantive narcotics violation would require dismissal of the 1975 indictment charging him with long-term participation in an extended conspiracy. This is not similar to the situation which existed in *United States* v. *Alo*, 439 F.2d 751, 754-55 (2d Cir.), *cert. denied*, 404 U.S. 850 (1971) where the second indictment merely supplanted a substantially identical sealed indictment returned several years before. Moreover, because there is no indication that Otvos would have been a potential witness had Stassi been prosecuted under the earlier indictment, appellant has

failed to demonstrate the prejudice required for dismissal. *United States* v. *Alo*, *supra*, 439 F.2d at 755.

The government was entitled to carry on its criminal investigation despite the return of the 1973 indictment. *United States* v. *Poeta*, 455 F.2d 117, 122 (2d Cir.), *cert. denied*, 406 U.S. 948 (1972). Appellant's further argument that he was thereby subjected to the "humiliation and degradation" of government surveillance furnishes too shaky a foundation upon which to build a claim of prejudice. *Cf. Hoffa* v. *United States*, 385 U.S. 293, 309-10 (1966).

Evidence Outside the Scope of the Indictment

Although the indictment charged a conspiracy running from 1970 to 1972, the District Judge permitted evidence of narcotics related transactions occurring in 1973. Numerous decisions of this Court have held such testimony to be admissible where it is probative of the existence of the conspiracy charged or the participation of the alleged conspirator. *See, e.g., United States* v. *Nathan*, 476 F.2d 456, 460 (2d Cir.), *cert. denied*, 414 U.S. 823 (1973); *United States* v. *Miranda*, 526 F.2d 1319, 1331 (2d Cir. 1975), *petition for certiorari filed*, 44 U.S.L.W. 3692 (May 1, 1976). Judge Knapp emphasized time and again that he was admitting the disputed testimony for the limited purpose of establishing the association of the parties. *See United States* v. *Diggs*, 497 F.2d 391, 394 (2d Cir. 1974), *cert. denied*, 419 U.S. 861 (1975). He also instructed the jury that the defendants were being tried only for the conspiracy charged in the indictment and that, if the jurors had a reasonable doubt as to the defendants' guilt, they were to acquit, even though they were "dead certain" that defendants had committed some other crime. There was no error here.

Proof was also introduced of numerous unrelated criminal acts by accomplices called as government witnesses, much of it on direct examination by the prosecution. Because the defense was armed with information required by 18 U.S.C. § 3500 and *Brady* v. *Maryland,* 373 U.S. 83 (1963) with which to discredit these witnesses, the government was entitled to take the initiative in this regard so that it would not be accused of withholding information from the jury. *United States* v. *Rothman,* 463 F.2d 488, 490 (2d Cir.), *cert. denied,* 409 U.S. 956 (1972). Defendants' failure to object indicates that the prosecution's questioning was neither unexpected nor improper.

Special Findings by the Jury

Prior to May 1, 1971, the conspiracy with which appellants were charged constituted a violation of 21 U.S.C. §§ 173 and 174. As of May 1, 1971, the provisions of these sections were replaced by §§ 812, 841, 846, 952 and 963. Because the old sections and the new provided for different terms of punishment, the District Judge, for sentencing purposes, was required to know which sections had been violated. *See Bradley* v. *United States,* 410 U.S. 605 (1973). With this in mind, he asked the jury to indicate in writing whether, in the event they found defendants guilty of the conspiracies charged, they became members of the conspiracy before or after May 1, 1971. Appellants argue that this was a request for a special verdict, generally held to be improper in a criminal case. *United States* v. *Adcock,* 447 F.2d 1337, 1339 (2d Cir.), *cert. denied,* 404 U.S. 939 (1971). However, where the specific information sought is relevant to the sentence to be imposed, it is not error to request it of the jury. 2 Wright, Federal Practice and Procedure: Criminal § 512 (1969); *Jalbert* v. *United States,* 375 F.2d 125, 126 (5th

Cir.), *cert. denied,* 389 U.S. 899 (1967); *United States* v. *Ogull,* 149 F.Supp. 272 (S.D.N.Y. 1957). In any event, appellants failed to object to the practice adopted by the District Court and may not now be heard to complain. *Cf. United States* v. *Jones,* 425 F.2d 1048, 1057 (9th Cir.), *cert. denied,* 400 U.S. 823 (1970).

Brady Material

On February 28, 1974, in a completely unrelated investigation, Special Agents James Bradley and Carlo Boccia, both of whom were witnesses below, attempted to stop the automobile of a person whom they mistakenly believed to be a narcotics dealer. An altercation ensued, during which Bradley shot and wounded the driver. The incident was investigated by both a federal and a state grand jury, and no charges were filed against any of the individuals involved. Moreover, a charge of assault by Bradley against the driver was eventually dismissed. Appellant Sorenson contends that a new trial should be granted under *Brady* v. *Maryland, supra,* because the government did not disclose this information to the defense.

While the concept of the *Brady* rule is clear, a review of our decisions in cases such as *United States* v. *Keogh,* 391 F.2d 138 (2d Cir. 1968); *United States* v. *Kahn,* 472 F.2d 272 (2d Cir.), *cert. denied,* 411 U.S. 982 (1973); *United States* v. *Rosner,* 516 F.2d 269 (2d Cir. 1975), *cert. denied,* 44 U.S.L.W. 3756 (June 30, 1976); and *United States* v. *Morell, supra,* 524 F.2d at 550 shows that the explication of the rule is sometimes as difficult as its application. Where the undisclosed evidence relates to the credibility of a government witness (*see Giglio* v. *United States,* 405 U.S. 150, 154 (1972), these difficulties are magnified by the broad scope of defendants' inquiry. In exploring the credibility of a government witness, de-

fense counsel may within reasonable limits inquire as to his "interest, his motives, his prejudices or hostilities, his means for obtaining knowledge of the fact, his power of memory, his way of life, his associations" and other similar matters. *United States* v. *Lawinski,* 195 F.2d 1, 7 (7th Cir. 1952); *see United States* v. *Dillon,* 436 F.2d 1093, 1095 (5th Cir. 1971); *Arpan* v. *United States,* 260 F.2d 649, 658 (8th Cir. 1958). Because evidence as to any or all of these matters might arguably be pertinent, something more than pertinancy had to be shown to mandate the granting of a new trial. There must have been a "significant chance" that the evidence would have affected the judgment of the jury. *United States* v. *Fried,* 486 F.2d 201, 203 (2d Cir. 1973), *cert. denied,* 416 U.S. 983 (1974). The District Judge felt that the undisclosed evidence above described did not meet this requirement, and we agree.

Moreover, subsequent to Judge Knapp's decision below, the Supreme Court fashioned a more exacting standard for the granting of a new trial in cases such as this. The thrust of *United States* v. *Agurs,* 44 U.S.L.W. 5013, 5017-18 (U.S. June 24, 1976) is that, in the context of the entire record, the omitted evidence must raise a reasonable doubt as to the defendant's guilt. Because the undisclosed evidence here was insufficient under the test previously applied in this circuit, it certainly does not satisfy the requirements of *Agurs.*

Other Assertions of Error

Appellants' remaining assertions of error require no extended discussion. Judge Knapp correctly charged the rule of *Pinkerton* v. *United States,* 328 U.S. 640 (1945) which permitted the jury to convict each of the conspirators of the substantive offenses charged if they were committed in furtherance of the conspiracy and were reasonably fore-

seeable by the defendant whose guilt was being considered. *United States* v. *Finkelstein, supra,* 526 F.2d at 522. Appellant Sorenson cites no authorities to support his post-trial argument that he was "extremely prejudiced" because two men in civilian clothes, who Sorenson asserts were police officers, accompanied another police officer when he was called as a government witness. The District Judge's comment that "[t]wo people walked in and walked out" appropriately summarizes this incident.

After a full hearing, Judge Knapp found that a government witness' selection of Sorenson's photograph was "in no way the result of suggestion". Bearing in mind the independent sources of identification described by the witness, *United States* v. *Mims,* 481 F.2d 636, 637 (2d Cir. 1973), and the substantial corroborative evidence of Sorenson's participation in the conspiracy, *United States* v. *Reid,* 517 F.2d 953, 967 (2d Cir. 1975), we do not find this to be the "rare exception" in which the District Judge's determination should be overruled. *United States* v. *Mims, supra,* 481 F.2d at 637.

With excerpts carefully culled out of context, appellants urge that they were deprived of a fair trial by remarks of the court and the prosecution. Having examined each challenged incident in the setting of the whole trial, *United States* v. *Wexler,* 79 F.2d 526, 530 (2d Cir. 1935), *cert. denied,* 297 U.S. 703 (1936), we find no merit whatever in appellants' contentions. Insofar as the forceful character of the prosecutor's summation may have exceeded the norm, this was prompted by defendants' repeated assertions that the prosecution was participating in or knowingly abetting a frame-up. *United States* v. *Santana, supra,* 485 F.2d at 371.

In summary, we find that appellants received a fair trial and that there was ample proof of their guilt. The judgments of conviction are therefore affirmed.